801 PRIVILEGE: SELF-DEFENSE: FORCE LESS THAN THAT LIKELY TO CAUSE DEATH OR GREAT BODILY HARM: CRIMES INVOLVING RECKLESSNESS OR NEGLIGENCE — § 939.48)

[INSERT THE FOLLOWING AFTER THE FIRST PARAGRAPH OF THE INSTRUCTION ON THE CRIME CHARGED BUT BEFORE THE ELEMENTS OF THE CRIME ARE DEFINED.]

Self-Defense

Self-defense is an issue in this case. In deciding whether the defendant's conduct [was criminally reckless conduct which showed utter disregard for human life] [was criminally reckless conduct] [was criminally negligent conduct],[1] you should also consider whether the defendant acted lawfully in self-defense.

The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[2] with the defendant's person; and;
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

[ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.]

[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used

was necessary to prevent imminent death or great bodily harm to (himself) (herself).]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[3] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[4] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

CONTINUE WITH THE DEFINITION OF THE ELEMENTS OF THE CRIME.

FOR ALL OFFENSES INVOLVING CRIMINAL RECKLESSNESS OR CRIMINAL NEGLIGENCE, ADD THE FOLLOWING TO THE DEFINITION OF THE RECKLESSNESS OR NEGLIGENCE ELEMENT:[5]

You should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, (his) (her) conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.[6]

FOR FIRST DEGREE RECKLESS OFFENSES, ALSO ADD THE FOLLOWING TO THE DEFINITION OF THE "UTTER DISREGARD FOR HUMAN LIFE" ELEMENT:[7]

[You should consider the evidence relating to self-defense in deciding whether the defendant's conduct showed utter disregard for human life. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed utter disregard for human life.][8]

CONTINUE WITH THE CONCLUDING PARAGRAPHS OF THE INSTRUCTION.

COMMENT

Wis JI Criminal JI-Criminal 801 was originally published in 1993 and revised in 2001, 2014 and 2019. The 2014 revision added to the text to reflect the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833. See footnotes 6 and 8. This revision was approved by the Committee in October 2021; it added to the comment.

This instruction is intended for use with crimes involving criminal recklessness or criminal negligence. See §§ 940.02(1), 940.06, 940.08, 940.23, 940.24, 941.20, 941.30, and 948.03(3). Wis JI-Criminal 800 is intended for use with crimes involving the intentional causing of bodily harm.

A case illustrating the application of self-defense to criminal recklessness and criminal negligence is State v. Langlois, 2018 WI 73, 382 Wis.2d 414, 913 N.W.2d 812. The defendant was charged with 1st degree reckless homicide; 2nd degree reckless homicide and homicide by negligent handling of a dangerous weapon were submitted as lesser included offenses. (See Wis JI-Criminal 1023, which provides an instruction for this sequence of offenses). There was evidence of self-defense in the case. The defendant alleged it was error for the trial court to fail to repeat that the burden was on the prosecution to prove beyond a reasonable doubt that the defendant was not privileged to act in self-defense when addressing the lesser included offenses. Instead, the court's instructions stated "as I previously indicated," referring to the definition given when instructing on 1st degree reckless homicide which included a full description of the burden of proof. The court held that this was not error – the context made the reference clear. In the

Committee's judgment, it is best practice to repeat the full statement of the burden of proof with each of the lesser included offenses.

Wisconsin law establishes a "low bar" that the defendant must overcome to be entitled to a jury instruction on the privilege of self-defense. State v. Stietz, 2017 WI 58, ¶16, 375 Wis.2d 572, 895 N.W.2d 796 citing State v. Schmidt, 2012 WI App 113, ¶12, 344 Wis. 2d 336, 824 N.W.2d 839. A defendant need only to produce "some evidence" in support of the privilege of self-defense. Stiez, supra, at ¶15. See also, State v. Head, 2002 WI 99, ¶112, 255 Wis.2d 194, 648 N.W.2d 413. Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). When applying the "some evidence" standard, a court is not to weigh the testimony, as this would invade that province of the jury. Stiez, supra, at ¶18. Instead, the court should focus on "whether there is 'some evidence' supporting the defendant's self-defense theory." Id. at ¶58. Failure "to instruct on an issue which is raised by the evidence" is error. State v. Weeks, 165 Wis. 2d 200, 208, 477 N.W.2d 642 (Ct. App. 1991).

In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply, or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

1. The Committee concluded that the description of the privilege should be integrated with the definitions of recklessness or negligence. This is because both concepts require that conduct create an unreasonable risk of death or great bodily harm. A risk is not unreasonable if the conduct undertaken is a reasonable exercise of the privilege of self-defense. Because criminal recklessness or criminal negligence and lawful actions in self-defense cannot coexist, it is best to advise the jury to consider the law relating to self-defense when considering those elements.

For example, the issue of self-defense might arise in a case where the defendant is charged with recklessly causing great bodily harm in violation of § 940.23. Wis JI-Criminal 1250 provides that the second element of that offense is that the defendant recklessly caused harm. Wis JI-Criminal 801 should be added to the definition of "recklessly" in Wis JI-Criminal 1250 if the evidence provides the basis for the privilege of self-defense.

This approach treats the privilege differently in recklessness cases than in cases involving the intentional causing of harm. In the latter, intent to cause harm and self-defense can exist at the same time. Thus, the absence of the privilege is identified as a fact the state must prove in addition to the statutorily defined elements of the intentional crime. See Wis JI-Criminal 800.

2. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." § 939.48(6). Further instruction on what constitutes "unlawful interference" in the context of the facts of a particular case may be desirable.

The word "unlawful" also appears in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-

defense. [See Wis JI-Criminal 815.] In State v. Bougneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 could constitute "unlawful conduct" for the purposes of § 939.48(2).

The "unlawful" component of "unlawful interference" is just one part of the predicate for invoking the privilege of self-defense. As stated in the instruction, the defendant must have believed "that there was an actual or imminent unlawful interference with the defendant's person and [must have] believed the amount of force he used or threatened to use was necessary to prevent or terminate the interference."

3. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

4. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self-defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to use doctrines other than self-defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self-defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self-defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

5. The Committee concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless offenses. Conduct does not create an unreasonable risk of harm to another if the conduct is undertaken as reasonable action in self-defense. Recklessness and reasonable exercise of the privilege cannot coexist. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "unreasonable risk" component of recklessness.

6. The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, in which the court of appeals ordered a new trial for a person convicted of 2nd degree recklessly endangering safety. The court held that the jury instructions given in that case – which followed the pattern suggested by Wis JI-Criminal 801 – were deficient because they did not specifically state that the prosecution must prove the absence of self-defense once raised. The first of the added sentences is intended to make that requirement clear. The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm.

7. The Committee concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless offenses. Conduct does not show utter disregard for human life if it is undertaken in the reasonable exercise of the privilege of self-

defense. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "utter disregard" element.

8. The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, see note 6, supra. Austin was concerned with the "unreasonable risk" element of the offense, but the same concern should apply to the "utter disregard" element of 1st degree reckless offenses. The first of the added sentences is intended to make it clear that the prosecution must prove the absence of self-defense once raised to meet its burden to prove "utter disregard for human life." The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the circumstances of the defendant's conduct showed utter disregard for human life.